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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

ST. LOUIS HAY AND GRAIN COMPANY, appellant,
v.
THE UNITED STATES.

No. 305.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

LOUIS A. PRADT,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

ST. LOUIS HAY AND GRAIN COMPANY, appellant, v. THE UNITED STATES. } No. 305.

APPEAL FROM THE COURT OF CLAIMS.

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STATEMENT.

On June 25, 1898, the chief quartermaster of the United States Army at Camp Thomas, Ga., advertised for sealed proposals for supplying said camp with 9,000,000 pounds of hay. The advertisement also gave the following information respecting such proposals:

> Awards made under accepted bids will provide that the quantities awarded may be increased or decreased at the option of the United States, not exceeding 20 per centum thereof, should the interest of the public service demand such change; that in case of change of the quantities required by increase or decrease,

notice of such change will be served on the bidder by the chief quartermaster; and, further, that if the troops shall be wholly or in part withdrawn, the awards shall become inoperative to the extent of such reduction. * * *

Deliveries of supplies to begin within five days from date of award, and proceed at daily rates of at least one-sixtieth of amounts, or in such quantities and at such times afterwards, as may be designated by the chief quartermaster or his authorized representative, free on board cars at Battlefield railroad station, Ga. (Rec., pp. 4 and 5.)

The claimant's written proposal to furnish said amount of hay, in accordance with said advertisement, at 61½ cents per 100 pounds, was accepted in writing, as follows:

HEADQUARTERS FIRST ARMY CORPS
AND CAMP GEORGE H. THOMAS,
CHIEF QUARTERMASTER'S OFFICE,
Chickamauga Park, Ga., July 12, 1898.

The ST. LOUIS HAY AND GRAIN COMPANY,
Saint Louis, Mo.

GENTLEMEN: Your proposal opened July 11, 1898, for supplying 9,000,000 pounds of baled hay at Battlefield, Ga., at 61½ cents per 100 pounds, is accepted.

Deliveries are to be made as prescribed in my circular to bidders of June 25 last, on which your proposal was based, and the hay must be of the quality stated in said circular, copy of which is inclosed herewith for your information and guidance.

The hay will be called for, inspected, received, and paid for by the depot quartermaster, Battlefield, Ga., at present Captain D. E. McCarthy, assistant quartermaster, U. S. Army, and all consignments should be made to him.

Very respectfully,

J. G. C. Lee,

Col. and Asst. Quartermaster Genl., U. S. A.,

Chief Quartermaster.

Thereafter the chief quartermaster stated to the president of the company that Capt. D. E. McCarthy, depot quartermaster, would do the ordering, and referred him to said Captain McCarthy for directions as to the exact amount that would be wanted daily. The president of the company thereupon called upon said Captain McCarthy, who gave him verbal orders to have not less than 8 nor more than 10 cars on the track daily. Eight car loads would amount to 160,000 pounds. (Rec., pp. 6–7.) At the time of the acceptance of the claimant's proposal there were about 12,000 animals at Chickamauga Park, but in August and September the camp was practically broken up. (Rec., p. 7 and p. 13.) Immediately thereafter the claimant made arrangements for the purchase of hay, mostly in the States of Indiana and Illinois, and its shipment direct to Chickamauga Park.

By the 27th of August, 1898, the claimant had delivered and the United States had accepted, pursuant to the foregoing agreement, 4,685,949 pounds of hay, or more than half the amount provided for in said agreement.

On the 28th of August Quartermaster McCarthy, above referred to, wired the claimant:

> Do not ship any more hay until notified to do so.

At that time the claimant was ready and willing to proceed with shipments at a rate practically identical with that at which it had been delivering the hay, in which event it would have completed the delivery of the entire 9,000,000 pounds by the close of September, 1898, at the price of its proposal, and sustained no loss. Upon receipt of the telegram of August 28, 1898, the claimant, by one of its officers, both verbally and in writing, protested against the stoppage of shipments. The quartermaster, however, would at that time accept no more hay. (Rec., pp. 7 and 8.)

On the 12th of September, 1898, and at various dates thereafter to May, 1899, Quartermaster McCarthy at Chickamauga Park sent telegrams to claimant calling for the delivery of hay in various amounts. One such telegram on March 23 read:

> Only four days' hay on hand. Unless you supply me, will purchase in open market at your expense.

To these telegrams the claimants made replies at various times, beginning on December 2, 1898, and ending June 24, 1899, fifteen replies in all. In ten of these replies claimant made various references to shipments of hay on "our contract," and in the last of these (June 24, 1899,) claimant inquired of Quartermaster McCarthy:

> We would like to know how soon you expect us to put in the balance of the hay due upon the contract, as we are anxious to get it all cleaned up.

In several of these replies the claimant made different assurances of its desire and readiness to ship hay under their contract, and in none of them did it make any intimation of any intention to refuse or to protest against such shipments. (Rec., pp. 7, 8, 9, and 10.)

The total amount of hay thus delivered by the claimant subsequent to August 28, 1898, was 3,814,490 pounds, which, added to the amount delivered prior to said date, made 8,500,439 pounds, the last delivery being on June 13, 1899, and thereafter no more hay was called for by the United States nor delivered by the claimant. (Rec., pp. 10–11.)

Between the 28th of August, 1898, when shipments were stopped by the telegram of the quartermaster, and the month of June, 1899, when the last of the hay was delivered, hay rose in price to such an extent that the cost to the claimant of the hay delivered after such suspension was $7,869 more than the price paid for the same according to the agreement. (Rec., p. 11.) The cost of the hay delivered by the claimant under the agreement prior to such suspension of shipment, including the cost of the transportation of the same, was $1,607.37 less than the amount received for the same under such agreement. (Rec., p. 12.)

Payments were always held back from the claimant by the quartermaster, and an amount due to claimant

was always in the hands of the quartermaster as security to compel it to deliver as required.

The claimant, before proceeding to deliver hay pursuant to the telegrams from the depot quartermaster hereinbefore set forth, beginning on the 12th of September, 1898, informed him that increased cost would be thrown upon the claimant if compelled to deliver, and requested to be relieved from so doing; but the depot quartermaster refused to release the claimant from the obligation of delivery. The claimant, while objecting, did not notify the depot quartermaster that it would demand damages for the losses sustained, or would seek to recover a higher price for hay to be delivered than that expressed in its proposals to deliver hay set forth in Finding I. Full payment was made by the defendants according to the terms of the aforesaid agreement, and was accepted by the claimant without protest or reservation at the time when the vouchers were given or the payments made. (Rec., p. 11.)

The last payment was received by the claimant on July 24, 1899. (Rec., p. 12.)

On May 11, 1899, the claimant submitted to the Quartermaster-General a claim against the United States "for $4,600, covering loss we sustained in filling our contract at Chickamauga National Park on hay, on account of Government not taking hay according to their proposal of one-sixtieth per day, and all papers pertaining to our contract *is* attached." The statement of this claim went on to recite an interview with the

Quartermaster-General's Department, Washington, and set forth that the claimant had acted in good faith "in filling this contract against our verbal protest through the writer to you, that we were losing money, and that Government should not require us to complete contract. But you so advised us you would go into open market and buy for our account and charge us difference."

Respecting this claim, Quartermaster McCarthy reported to the Quartermaster-General, under date of June 28, 1899, as follows:

> It would seem but just that this firm's claim should be approved after it has been clearly shown that the amount of their claim is based on an increased cost of hay to them.

And at a later date as follows:

> Undoubtedly deliveries were made for a longer period than contemplated when bids were made by the contractors.
>
> At that time there were about 12,000 animals at the camp at Chickamauga Park, but in August and September the camp was practically broken up.
>
> The contractors continued to supply us with hay until July, 1899, and in the meantime, especially during the winter months, hay had advanced in price, so that it seemed but just that some recompensation should be made to the contractors.

The claim, however, was not allowed by the accounting officers, on the ground that it was for unliquidated damages. (Rec., pp. 12–13.) There-

after suit was brought upon the claim in the Court of Claims.

The court held that the written agreement between the parties was invalid because not made in the form required by section 3744, Revised Statutes, but that there had been an accord and satisfaction between the parties which precluded the claimant from maintaining its claim on the *quantum meruit*, and dismissed the petition.

This appeal is from such judgment of dismissal.

SUMMARY.

In the foregoing statement all of the facts found by the Court of Claims are recited in substance, but the controlling facts upon which the judgment of the Court of Claims rests are briefly these:

In 1898, during the war between Spain and the United States, the claimant and the United States entered into a written agreement, contained in various writings, for the purchase and sale of 9,000,000 pounds of hay at the agreed price of 61½ cents per 100 pounds, to be delivered at a military camp of the United States in Georgia. This agreement contained the provision that the deliveries were to "proceed at daily rates of at least one-sixtieth of the amounts, or in such quantities and at such times afterwards as may be designated by the chief quartermaster or his authorized representative," and at the time the agreement was entered into it was mutually expected by the claimant and the officer representing the United States that the full amount of hay would

be substantially required for use at the camp within sixty days from the time of the beginning of delivery. Deliveries were begun by the claimant *shortly after the 12th of July, 1898,* and continued until August 27, when more than half of the agreed amount had been delivered, but on August 28 the quartermaster in charge, by reason of the fact that the camp was practically broken up, telegraphed the claimant to ship no more hay until notified to do so: to which stoppage of shipments the claimant protested both verbally and in writing. Nevertheless, deliveries were resumed on the 12th of September, at the demand of the quartermaster, at which time the period of sixty days had nearly expired, and were continued at various times to the 13th of June, 1899, at the request of the quartermaster, until the agreed amount was substantially delivered. All of such deliveries of hay were from the outset required by the quartermaster on behalf of the United States, and made by the claimant, pursuant to and in recognition of the binding force of the agreement between the parties; and full payment, according to the terms of the agreement, was made by the defendants and accepted by the claimant without protest or reservation at the time when the vouchers were given or the payments made, the last payment being received by claimant on July 24, 1899.

The claimant before proceeding to deliver hay, pursuant to the demands of the quartermaster, beginning on the 12th of September, 1898, informed him that increased cost would be thrown on it if compelled to

deliver, and requested to be relieved from so doing, but the depot quartermaster refused to release the claimant from the obligation of delivery. The claimant, while objecting, did not notify the depot quartermaster that it would demand damages for the losses sustained or would seek to recover a higher price for hay to be delivered than that expressed in the agreement.

The present claim was submitted in writing to the Quartermaster-General, under date of May 11, 1899, by the claimant, "for $4,600, covering loss we sustained in filling our contract at Chickamauga National Park on hay, on account of Government not taking hay according to their proposal of one-sixtieth per day."

ARGUMENT.

The Court of Claims held, respecting the agreement or contract of the parties contained in the advertisement of the deputy quartermaster-general of the United States calling for proposals for forage and straw and the accompanying information furnished in connection therewith, the written bid of the claimant, and the acceptance in writing thereof by the assistant quartermaster-general, that—

> The agreement not being in writing and signed by the parties, as required by the Revised Statutes, section 3744, was not a valid contract upon which an action can be brought for damages caused by the defendant's breach.

The court thus held on the authority of the leading case of *Clark* v. *United States* (95 U. S., 359), in which it is declared that section 3744, Revised Statutes, is a

statute of frauds relating to the contracts with the United States specified therein. Indeed, the statute itself, when enacted, was entitled "An act to prevent and punish fraud on the part of officers entrusted with the making of contracts for the Government." (12 Stat. L., 411.)

Starting from this, the claimant contends on this appeal that it was entitled to wholly disregard the agreement which it entered into with the United States and to maintain a claim as upon an implied contract for the reasonable value of the hay delivered by it to the United States, because its agreement with the United States for the purchase and sale of said hay, although complete and definite and in writing, was not written out in formal manner and signed at the end thereof by both parties, according to the requirements of the special statute of frauds relating to such contracts. This position would be unassailable if it were not for one vital fact, namely, that the express agreement of the parties, although not enforceable as an executory contract, has nevertheless been fully executed on both sides by the delivery of the hay on the part of the claimant and the payment in full therefor at the agreed price, by the United States.

It is true that where services have been rendered or goods delivered under a contract within the statute of frauds, an action may be maintained on the *quantum meruit* as upon an implied contract, *but only where the defendant is in default.*

Where payments are made or services rendered upon a contract void by the statute of

> frauds, and the party receiving the services or payments refuses to go on and complete the performance of the contract, the other party may recover back the amount of such payments or the value of the services in an action upon an implied assumpsit. But to entitle him to maintain such action he must show that the defendant is in default.
>
> *Galvin* v. *Prentiss*, 45 N. Y., 164.
> *Day* v. *Railroad Co.*, 51 N. Y., 583.
> *King* v. *Brown*, 2 Hill (N. Y.), 487.
> *Coughlin* v. *Knowles*, 7 Met., 61–62.

The case of *Clark* v. *United States* (95 U. S., 539), relied upon by the claimant, is entirely in harmony with this doctrine. In that case the claimant had entered into a parol contract with the United States which this court held to be invalid because not conforming to section 3744 Revised Statutes. This contract, however, had been executed on the part of the claimant, but the defendant had refused to make compensation, and accordingly this court held that the claimant was entitled to recover as upon an implied contract for a *quantum meruit* (p. 542). But there is no analogy between this case and the Clark case. In this case the parties entered into an agreement in writing which contained all the elements of a contract, but which was not binding upon nor enforceable by either party, because not made in comformity with the provisions of section 3744, Revised Statutes. It is clear, however, that both parties considered that they had entered into a valid contract, and that

they acted upon this view from the time that the agreement was entered into until the last delivery of hay by the claimant and the last payment therefor, according to the terms of the agreement, by the United States. Throughout this whole period of nearly a year the officer representing the Government at various times called upon claimant to make deliveries of hay as needed by him, and in every instance these requests were complied with by the claimant, upon the manifest understanding on its part that it was bound by such contract. On December 2, 1898, the claimant wrote to the defendant for "an order for some more hay on our contract;" on December 10, 14, and 29, claimant made similar communications to the quartermaster. On March 23, 1899, the quartermaster wired: "Only four days hay on hand. Unless you supply me will purchase in open market at your expense. This is the third and last call. Follow cars with wire, so there will be no delay;" to which claimant replied on the same date: "Need not worry. Hay on way. Will rush." At various other times thereafter, claimant, communicating with the quartermaster, made reference to *its contract*, and on May 1 assured the quartermaster that he need not go on the open market to purchase, as "We will have hay with you all the time." At one time during this period, to be sure, claimant protested to the quartermaster against the stoppage of shipments by the quartermaster, but this protest contained no intimation that the claimant did not consider itself bound by the contract. On the contrary, such protest contained within

itself an express recognition of the validity of the contract, for it consisted in the statement that increased cost would be thrown upon claimant if it were compelled to deliver at a time beyond the contemplated sixty days; but though thus objecting the claimant did not notify the depot quartermaster that it would demand damages for losses sustained or would seek to recover a higher price for hay to be delivered than that agreed upon. This protest or objection was not heeded by the quartermaster, who refused to release the claimant from the obligation to deliver which both parties supposed rested upon it, and thereupon, as above stated, the deliveries of hay were resumed and continued with express reference to the contract between the parties until, on June 24, 1899, the claimant inquired of the quartermaster, "Would like to know how soon you expect us to put in the balance of the hay due upon the contract, as we are anxious to get it all cleaned up," and was informed that no more hay would be called for. During the time that the claimant made deliveries of hay under the contract, payment was made from time to time at the agreed price, and in full on July 24, 1899. These payments were accepted by the claimant without protest or reservation at the time the vouchers were given or the payments made. Lastly, near the close of the period in which the deliveries of hay were made, when the claimant for the first time asserted any claim against the United States for anything beyond the agreed price for the hay, it was done in a statement, which explicitly recognized the validity and

binding force of the contract, asking compensation for—

> loss we sustained in filling our contract at Chickamauga National Park on hay on account of Government not taking hay according to their proposal of one-sixtieth per day, and all papers pertaining to our contract *is* attached. * * * . We have acted in good faith with you in filling this contract against our verbal protest through the writer to you that we were losing money and that Government should not require us to complete the contract.

It is very clear from the terms of this statement of their claim that the claimant recognized that it had delivered the hay pursuant to the contract and under the supposition that it was bound to do so, and that it had no thought at the time of asserting any other claim than for losses sustained through being compelled to complete the contract by delivering hay under it beyond the sixty days within which it had been contemplated, at the time the agreement was entered into, that full delivery would be required and made. Moreover, in the petition filed in this case in the Court of Claims, the claimant relied upon the "contract created between the parties" and asked for damages for its violation. (Rec., pp. 2–3.)

We have, then, a contract between the parties which came within a special statute of frauds relating to contracts with the United States, and which for that reason could not be enforced by either party, but a contract,

nevertheless, which each party supposed was valid and binding, and which has been fully executed on the part of the claimant by delivering all of the hay required by the United States, and on the part of the United States by paying therefor in full at the agreed price. So that nothing remains to be done by either party, nor is either party in default respecting such contract. Under these circumstances an action can not be maintained as upon an implied contract by either party, for the reason that the express contract constitutes a perfect defense to such action, despite the fact that at the time it was entered into it was invalid as an executory contract.

> The courts have not treated these contracts [within the statute of frauds] as absolutely void. When fully executed they define and measure the rights of the parties thereto, and if this contract had been fully executed and the plaintiff had earned the price stipulated and had then brought *quantum meruit* on the grounds that the services were reasonably worth more, the contract so executed would have been a full answer. (*Stone* v. *Dennison*, 13 Pick., 1.)
>
> *King* v. *Welcome*, 5 Gray (Mass.), 44.

In the case of *Stone* v. *Dennison*, cited above in *King* v. *Welcome*, the plaintiff, who was a minor, entered into a contract with the defendant to work for him until he should attain his majority, in consideration of the furnishing to him by the defendant of his board, clothing, and education. This contract was fully executed on both sides; but after he became of age the plaintiff sued

the defendant on a *quantum meruit* to recover a greater compensation than that already received for his services. The defendant pleaded in defense the express contract. The court held that the defense was good, and that the action could not be maintained, because the contract, although within the statute of frauds, had been fully performed on both sides, saying:

> The defendant is not seeking to enforce this agreement as an executory contract, but simply to show that the plaintiff is not entitled to recover upon a *quantum meruit* as upon an implied contract. But the statute does not make such a contract void. * * * Where a contract has been in effect performed, the rights, duties, and obligations of the parties resulting from such a performance stand unaffected by the statute.

See also—

Gillespie v. *Battle*, 15 Ala., 276.
Williams v. *Beemis*, 108 Mass., 91.

Indeed, it is a well-settled principle that the statute of frauds has no application to an executed agreement.

Remington v. *Palmer*, 62 N. Y., 31.
Larson v. *Johnson*, 78 Wis., 306.
House v. *Bernheim*, 59 Conn., 133.

> The parol agreement being executed, therefore, neither of the parties can afterwards object that the contract was within the statute of frauds. Where a contract, which when made was within the statute of frauds and might have been voided thereby, has been fully executed, the statute furnishes no defense.
>
> *McCue* v. *Smith et al.*, 9 Minn., 258.

> If they [the contracts within the statute of frauds] be fulfilled and executed, they are just as valid as though they had been in writing. * * * The statute operates on a contract *only when it is executory.* It does not make a performance of such contracts unlawful. Hence a party may always defend under such a contract when sued for any act done under it. *Webster* v. *Lecompte*, 74 Md., 258–9, citing *Crane* v. *Gough*, 4 Md., 333.

Finally the same rule of law has been announced by this court in *Bibb* v. *Allen* (149 U. S., 497), as follows:

> It is well settled by the authorities that the defense of the statute of frauds can not be set up against an executed contract. (*Dodge* v. *Crandall*, 30 N. Y., 294, 304; *Brown* v. *Farmers' Loan and Trust Co.*, 117 N. Y., 266, 273; *Madden* v. *Floyd*, 69 Alabama, 221, 225; *Gordon, Rankin & Co.* v. *Tweedy*, 71 Alabama, 202, 214; *Huntley* v. *Huntley*, 114 U. S., 394, 400; Browne on Stat. of Frauds, sec. 116.) This rule proceeds and rests upon the principle that there is "no rule of law which prevents a party from performing a promise which could not be legally enforced, or which will permit a party, morally but not legally, bound to do a certain act or thing, upon the act or thing being done, to recall it to the prejudice of the promisee, on the plea that the promise, while still executory, could not by reason of some technical rule of law have been enforced by action." (*Newman* v. *Nellis*, 97 N. Y., 285, 291.)

In the light of the foregoing authorities and upon the undeniable facts in this case, the decision of the

Court of Claims in this case that the claimant is precluded from maintaining this action by an accord and satisfaction seems to be fully warranted. It is not contended, of course, that there has been any accord and satisfaction respecting the present claim, but only that the present claim can not be maintained because of the complete execution of the express contract of the parties and the accord and satisfaction in relation thereto.

Counsel for claimant seem to labor under the impression that, in setting up the executed express contract of the parties as a defense to the present action upon an implied contract, while conceding that that contract was within the statute of frauds and nonenforceable, we are playing fast and loose with that contract, treating it as a nullity for one purpose and setting it up as a defense for another; but this is a clear misapprehension of our position. Nor does the cited case of *Williams* v. *Beemis* (108 Mass., 91) support any such view. On the contrary, we have relied in this argument upon that very case to support the proposition that an action can not be maintained as upon an implied contract where there is an existing express contract between the parties, invalid because within the statute of frauds, *unless the defendant is in default.* (See p. 17 of this brief.) That we are warranted in such reliance would seem to appear with sufficient clearness from the decision itself (pp. 92–93):

> An action for money had and received lies to recover back money paid by a party to an agreement which is invalid by the statute of

> frauds, and which the other party refuses to perform. * * * "The true principle is this: The contract being void and incapable of enforcement in a court of law" (the defendant having refused to perform it), "the party paying the money or rendering the services in pursuance thereof may treat it as a nullity and recover the money or value of the services under the common counts." (*King* v. *Brown*, 2 Hill, 485–487, per Nelson, C. J.)

THE CLAIM AS ORIGINALLY PRESENTED.

There is another light in which to view this claim, albeit not presented by counsel for claimants on this appeal, and that is the form in which the claim itself was first presented by the claimant through its statement filed with the quartermaster on May 11, 1899, in which compensation was asked "for loss we sustained in filling our contract at Chickamauga National Park on hay, on account of Government not taking hay according to their proposal of one-sixtieth per day," and later in the petition in this case. But the claim as thus presented seems to be without foundation from any point of view. To begin with, as stated in the opinion of the Court of Claims (Rec., p. 14), it is not at all clear that the Government was bound by the terms of the contract to accept full delivery of the hay within sixty days, for the provision in the contract that deliveries were to "proceed at daily rates of at least one-sixtieth of the amount" is very materially qualified by the following phrase "or in such quantities and at such times afterwards as may be designated by the chief quartermaster

or his authorized representative." The interpretation placed upon this part of the contract by the quartermaster was that it gave him authority to order hay in such quantities as he desired, and in this view the claimant, under the supposition that the contract was valid and binding, acquiesced, although protesting and reluctantly, by acceding to the various demands of the quartermaster for deliveries of hay made by him after the period of sixty days had expired. In so doing the claimant certainly waived whatever rights he may have had under this clause of the contract, and brought himself within the rule laid down in *Gibbons* v. *United States* (2 C. Cls. R., 421; 8 Wall., 269), in which case, upon a state of facts practically identical with the facts in this case, the Court of Claims said:

> The Government could not compel the delivery of the oats, which were the subject of the contract, after its right to demand them had ceased, and this the claimant should have known; hence, he can not recover the difference in price between that named in the contract and that ruling in market after its expiration, for the oats subsequently delivered under the assumed compulsory power of the quartermaster.

This view was sustained on appeal by this court in the following language:

> It is very clear that but one contract was ever made in this case, and that the plaintiff was absolved from this by the refusal of the quartermaster to receive the oats when tendered but from whatever motive he may afterwards

> have consented to renew that agreement and proceed to its fulfillment, its terms were the same. * * * The quartermaster treated the contract as still in force, and his demand on the plaintiff was made under that idea. In this he was wrong, but the plaintiff had his option to concur in this view and deliver the balance of the oats or to refuse to deliver any more. * * * That he feared the officer might buy the oats in market and hold the difference in the price from the money due for oats already delivered [*this was exactly the situation in the present case*] does not invalidate the contract which he consented to fulfill to avoid that result.

But finally, of course, the claimant could not enforce such a claim, because to do so would be an attempt to enforce a contract which it is conceded is invalid as an executory contract.

EQUITIES OF THE CLAIM.

Much stress is placed on this appeal upon the following remark in the opinion of the court below:

> It must be acknowledged that this case belongs to that class which has been termed by many courts "hard cases," and that the hardness of it was caused by officers of the Government neglecting their statutory duty (R. S., 3746), and that the claimant, being ignorant of the law, might well rely upon the officers of the Government to reduce the contract to legal form.

But a complete answer to this comment is to be found in the Gibbons case, above cited; for if the contract had been put in legal form, as required by section

3744, the claimant would, under the rule laid down in the Gibbons case, be without remedy, even conceding that by the terms of the contract it was not bound to make delivery of hay after the period of sixty days had elapsed; for the deliveries made by it after that period would, upon the authority of the Gibbons case, have been made under the contract.

As to the *justice* of the claim, without respect to its legal status, it may be fairly said that the claimant took its chances of the possibility that the full amount of hay would not be required during the sixty days, but that exactly the contingency that did occur might occur—that the camp would be broken up and the delivery of hay interrupted and prolonged thereby. And by way of illustration: Suppose that the price of hay instead of increasing had decreased, and that the hay had been delivered and paid for at the contract price, as in the present instance; what sort of standing would a claim on the part of the United States possess, for repayment by the claimant to the United States of the difference between the agreed price paid and the market value of the hay? And yet the analogy between such a claim and the claim under consideration seems to be very close.

However viewed, the judgment of the Court of Claims seems to be well grounded.

LOUIS A. PRADT,
Assistant Attorney-General.